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December 30, 2003

BY HAND DELIVERY

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2003 DEC 30 P 4:12

Re: MUR 5396 (Campaign for Working Families and Amy R. Myers, as treasurer)

Dear Mr. Norton:

On behalf of our clients, Campaign for Working Families ("CWF") and Amy R. Myers, Treasurer, we write to respond to the Commission's reason to believe finding in the above-captioned matter under review.¹ As explained below, the staff's Factual and Legal Analysis does not support a finding that CWF and Ms. Myers violated the Act, and in fact there was no such violation. In the interest of resolving this matter, CWF and Ms. Myers do nonetheless intend to accept the Commission's invitation to engage in pre-probable cause conciliation. We will submit a counter-proposal to the Commission's proposed conciliation agreement in the coming days.

¹ On December 22, 2003, CWF and Ms. Myers submitted to the Commission by facsimile and by hand a timely written request for an extension of the deadline for filing this response, in light of the burden and difficulty of preparing a response during the holiday travel season. Late yesterday afternoon, by which time this response had been prepared notwithstanding the unavailability of key personnel, the staff advised that an extension would be granted only if our clients agreed to toll the running of the statute of limitations. This is not the first time that we have seen the staff provide notification of a reason to believe finding just before the Holidays, and then condition a reasonable extension on agreement to toll the statute of limitations. In the circumstances, we have declined the extension.

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Factual Background

CWF is a non-partisan, multicandidate political committee dedicated to electing pro-family, pro-life, pro-growth candidates to federal and state office. Like other multicandidate political committees, one of CWF's most important objectives is maintaining and enhancing its mailing list, which it uses for both fundraising and advocacy purposes.

In early 1999, CWF and Bauer for President 2000, Inc. ("Bauer 2000") negotiated a mailing list exchange. The complete terms of the transaction were embodied in a written memorandum prepared by Bauer 2000's direct mail vendor, The Lukens Cook Company. *See* Exhibit A attached hereto (January 22, 1999 memorandum from Walter Lukens to Peter Dickinson). The CWF/Bauer 2000 list exchange was not structured as a simple, simultaneous swap of lists of the sort addressed in the Commission advisory opinions cited in the staff's Factual and Legal Analysis. Rather, it was a sophisticated transaction in which CWF traded limited use of its existing mailing list for the right to utilize in perpetuity Bauer 2000's enhanced list, starting at a future date. Such transactions, although somewhat more complex than the type of simultaneous list swaps previously considered by the Commission, are now customary in the industry.

Under the terms of the CWF/Bauer 2000 agreement, CWF authorized Bauer 2000 to utilize the CWF "house" mailing list for a limited period of time in exchange for Bauer 2000's promise to provide CWF with Bauer 2000's augmented version of that list at the end of the Bauer candidacy, for use in perpetuity. At the time this agreement was reached, CWF could not know with certainty the extent to which Bauer 2000 would succeed in enhancing the list, although CWF had good reason to believe that the final Bauer 2000 list would be uniquely valuable as a fundraising vehicle for CWF. In exchange for CWF's authorization of the use of its existing list by Bauer 2000, it received as valuable consideration the ability to use the enhancements to that list that the Bauer 2000 campaign was expected to provide.

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Legal Analysis

The staff's Factual and Legal Analysis concludes that "there is no apparent valuation under which this transaction can be considered an exchange of donor lists of equal value. Thus, there is reason to believe that the list exchange was an excessive contribution from CWF to [Bauer 2000]." Factual and Legal Analysis at 5. In a list exchange transaction of this sort, however, the economically relevant question is not, as the staff's analysis assumes, whether, *ex post*, the names provided by CWF equaled in value the names ultimately provided by Bauer 2000. Rather, the question is whether, *ex ante* (at the time the CWF/Bauer 2000 agreement was consummated), CWF had a reasonable expectation that the value of the names CWF would receive for use in perpetuity would equal or exceed the value of the names provided by CWF for limited use by the Bauer 2000 campaign. In commerce, business people make decisions of this nature every day.

In January 1999, CWF had more than sufficient basis for concluding that the Bauer candidacy was likely to enhance the list generally, and that any enhancements to the list were likely to be especially valuable to CWF in particular. Those donors who supported the Bauer campaign were very likely to be potential supporters of CWF because of the similarities in CWF's and Bauer 2000's ideological positions. In addition, the value of the list would be enhanced if the Bauer campaign outperformed expectations, thus generating more donors. If the Bauer campaign did outperform expectations, CWF was entitled to receive the full added value to the list, without any limit. In that contingency, CWF might receive back from Bauer 2000 a list of much greater value (calculated *ex post*) than the list provided by CWF at the outset of the campaign. Although it was also possible that the final Bauer 2000 list would not enhance value relative to the list provided by CWF, CWF made a reasonable decision that the potential gain more than offset the potential risk. Indeed, even small numerical additions to the list have great value, since CWF will be able to use those names in perpetuity.

Thus, in view of CWF's ability to use the added names in perpetuity, CWF disputes the basic premise of the finding. Even if it were the case, however, that CWF's expectations

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regarding the *ex post* value of the Bauer 2000 list proved wrong, that fact by itself would not result in an in-kind contribution. The consideration paid by Bauer 2000 for the CWF list was its commitment allowing CWF to utilize the Bauer 2000 list beginning at a future date. If CWF paid fair market value for that consideration, then there was no in-kind contribution, regardless of whether the transaction ultimately resulted in a profit or a loss for CWF when the time came for Bauer 2000 to transfer use of its list back to CWF.

Valuing such exchanges *ex post*, as the staff attempts to do in its Factual and Legal Analysis, would preclude political committees from ever engaging in contingent list exchanges because a political committee could never be sure whether the transaction would ultimately result in a precisely equivalent exchange within some time period. Instead, the Commission should look at whether, based on the facts known at the time, the exchange represented a reasonable commercial transaction at fair market value. Here, in light of the likely overlap between CWF and Bauer 2000 supporters, and CWF's unlimited right to use names added by Bauer 2000 to the list, there was a reasonable basis for CWF to conclude that the Bauer campaign would enhance the list to at least the degree of the then-market value of CWF's mailing list. The Factual and Legal Analysis provides no basis for questioning the reasonableness of CWF's valuation of the rights it purchased.

Conclusion

The method of valuing the CWF/Bauer 2000 list exchange adopted by the staff in its Factual and Legal Analysis is inappropriate for the type of exchange at issue here. For CWF, the transaction carried a high potential return with little economic risk, since the prospect of list degradation was minimal. The staff has provided no basis for questioning the price that CWF paid for the future right to use the Bauer 2000 final list. The price was reasonable and no in-kind contribution to Bauer 2000 resulted from the list exchange.

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Nevertheless, as noted above, because CWF is eager to resolve this matter to the mutual satisfaction of the parties, it intends to submit a counter-proposal to the Commission's proposed pre-probable cause conciliation agreement.

Sincerely,

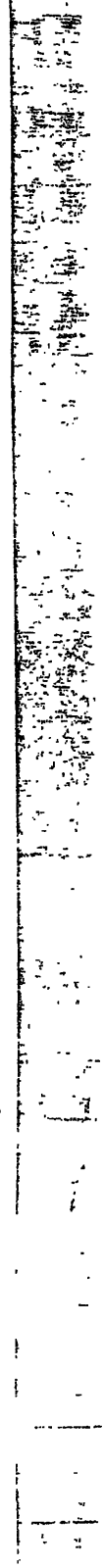


Bobby R. Burchfield

Robert K. Kelner

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The Lukens Cook


COMPANY

DIRECT RESPONSE
MARKETING

January 22, 1999

MEMORANDUM

TO: Peter Dickinson

FROM: Walter Lukens 

RE: Exchanges between Campaign for Working Families and Bauer for President 2000 Exploratory Committee

Peter, the following outlines the exchange process between Campaign for Working Families (CWF) and the Bauer for President 2000 Exploratory Committee, (BFP). It will also apply to any future committees created by Gary should he decide to become a candidate for President.

1. All exchanges between CWF and BFP of both CWF donor and non-donor data files will be coordinated through Pinnacle List Company and Pinnacle will keep an exchange balance history for both donors and non-donors. This exchange balance history will include sample copy, actual mail dates and actual mail quantities for each BFP usage of the CWF files.
2. To facilitate the exchange process and ensure as few delays as possible, BFP will receive a complete copy of both the CWF donor and non-donor data files for use during the exploratory process and potentially throughout a presidential campaign. At the conclusion of the exploratory process, or in the event of a presidential campaign, at the conclusion of the campaign, BFP will provide CWF a complete copy of all BFP donor and non-donor data files. At the outset, CWF will pay the cost of providing BFP with a copy of both CWF donor and non-donor files and in return at the conclusion of the campaign, BFP will pay the cost of providing CWF with copies of the BFP donor and non-donor files.

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3. BFP will submit to Pinnacle a Request to Mail Form along with proposed copy for each mailing BFP is planning to either of the CWF files. Upon CWF's approval, BFP will pull selects from its copy of the CWF files and provide an output count to Pinnacle. BFP will pay the cost of pulling these selects directly. When the BFP files are provided to CWF at the end of either the exploratory process or a presidential campaign, CWF will also pull its selects from the BFP files and pay the cost of doing so directly.
 4. Please be advised that all CWF donor and non-donor names will remain the sole property of CWF and any and all BFP donor and non-donor names will remain the property of BFP.

If you have any questions about this process, please let me know as soon as possible
Thanks.